

Bank Muamalat Malaysia Bhd v Fan Kow Hin

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22M-51-04 OF
2016
AZIZAH NAWAWI J
10 FEBRUARY 2017

Contract — Shares, sale of — Option — Plaintiff and Singaporean defendant signed put option deed under which plaintiff had put option to require defendant to buy whole or part of certain option shares in Singaporean company of which defendant was chief executive officer — Put option deed governed by Malaysian law — Plaintiff issued put option notice to defendant within put period to buy whole of option shares at certain price — Defendant failed to pay arguing because company was undergoing merger with another entity he could not deal with option shares without breaching Singapore Code on Take-Overs and Mergers ('Singapore Code') — Whether put option deed and put option notice valid and binding under Malaysian law and unaffected by Singapore Code — Whether defendant contractually bound to honour put option notice

Following the issuance to the plaintiff of 26,750,811 new ordinary shares ('option shares') in a company ('IHC'), the plaintiff and the defendant entered into, respectively, a call option deed of undertaking ('call option deed') and a put option deed of undertaking ('put option deed') under the Syariah principle of *'wa'd'*. Pursuant to the call option deed, the plaintiff granted the defendant the call option to require the plaintiff to sell to the defendant the whole or part of the option shares ('call option') at the call price of SGD0.30 per option share. The call option was exercisable from 17 April–24 September 2015 ('call period'). Under the put option deed, the defendant granted the plaintiff the put option to require the defendant to buy from the plaintiff the whole or part of the option shares ('put option') at the call price of SGD0.33 per option share. The put option was exercisable from 25 September–16 October 2015 ('put period'). The parties agreed that Malaysian law would govern the put option deed. When a proposed merger between IHC and another company was underway, the defendant sought from the plaintiff an extension of three months on the put period on the ground that since he was the chief executive officer ('CEO') of IHC, the Singapore Code on Take-Overs and Mergers ('the Singapore Code') prohibited him from dealing with the securities of IHC pending the approval of the proposed merger by the Securities Industry Council of Singapore. The plaintiff replied that it could not agree to the request taking the position that the put option deed was governed by Malaysian law and therefore was unaffected by the Singapore Code. The plaintiff later issued, within the put period, a put option notice to the defendant to buy the whole of

- A the option shares at SGD8,827,767.63 ('the put price'). Of that sum, the defendant only paid SGD100,000 and failed to pay the balance even after he had ceased to be CEO of IHC. In the instant suit to recover the balance put price of SGD8,727,767.63 plus damages and compensation (*'ta'widh'*), the plaintiff applied for summary judgment under O 81 r 1 of the Rules of Court 2012. The defendant opposed the application saying the put option deed was rendered voidable/unenforceable during the put period because, inter alia, public policy would not have allowed him to breach the Singapore Code.
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Held, allowing the application:

- C (1) The laws of Singapore had no impact on the put option deed and the put option notice which were governed by the laws of Malaysia pursuant to cl 14 of the put option deed. Under the laws of Malaysia, there was nothing to suggest the put option deed was invalid. The deed remained a
- D lawful, valid and binding contract. The put option notice was also valid as the same was issued within the put period. The defendant was therefore bound by the terms of the put option deed and contractually obliged to comply with the put option notice (see paras 27–28 & 31).
- E (2) Since 31 January 2016, when the defendant resigned as Group CEO of IHC, and despite the notice of demand issued by the plaintiff's solicitor dated 12 February 2016, the defendant failed to pay the balance of the put price of SGD8,727,767.63 that was outstanding. There was no deadline as to the completion period of the put option under the put option deed. Instead, the parties had expressly agreed that if the
- F defendant failed to pay for the put price on the due date for payment, he had to pay the plaintiff damages by way of compensation (*'ta'widh'*) on the amount outstanding (see paras 29–30).

[Bahasa Malaysia summary]

- G Berikutan pengeluaran sebanyak 26,750,811 saham biasa baru kepada plaintiff ('saham opsyen') di dalam syarikat ('IHC'), plaintiff dan defendan memasuki, surat ikatan akujanji opsyen beli ('surat ikatan opsyen beli') dan surat ikatan akujanji opsyen jual ('surat ikatan opsyen jual') masing-masing di bawah prinsip Syariah '*wad'*. Berikutan kepada surat ikatan opsyen beli, plaintiff
- H memberikan defendan opsyen beli yang mengkehendaki plaintiff untuk menjual kepada defendan keseluruhan atau sebahagian saham-saham opsyen tersebut ('opsyen beli') pada harga belian SGD0.30 sesaham opsyen. Opsyen belian dilaksanakan dari 17 April–24 September 2015 ('tempoh belian'). Di bawah surat ikatan opsyen jual, defendan memberikan plaintiff opsyen jual
- I yang mengkehendaki defendan membeli daripada plaintiff keseluruhan atau sebahagian daripada saham opsyen ('opsyen jual') pada harga belian SGD0.33 sesaham opsyen. Opsyen jual dilaksanakan dari 25 September–16 Oktober 2015 ('tempoh jual'). Pihak-pihak bersetuju bahawa undang-undang Malaysia akan mengawal surat ikatan opsyen jual tersebut. Apabila cadangan gabungan

di antara IHC dan syarikat yang lain sedang diusahakan, defendan memohon daripada plaintif lanjutan selama tiga bulan atas tempoh jual atas alasan bahawa memandangkan dia adalah ketua pegawai eksekutif ('CEO') IHC, Singapore Code on Take-Overs and Mergers ('Kod Singapura') melarangnya daripada berurusan dengan sekuriti-sekuriti IHC sementara menunggu kelulusan cadangan gabungan oleh Securities Industry Council of Singapore. Plaintif menjawab bahawa ia tidak bersetuju kepada permintaan yang membolehkan bahawa surat ikatan opsyen jual dikawal oleh undang-undang Malaysia dan oleh itu tidak terjejas oleh Kod Singapura. Plaintif kemudiannya mengeluarkan, dalam tempoh jual tersebut, notis opsyen jual kepada defendan untuk membeli keseluruhan saham opsyen pada harga SGD8,827,767.63 ('harga jual tersebut'). Daripada jumlah tersebut, defendan hanya membayar SGD100,000 dan gagal untuk membayar baki walaupun selepas dia tamat menjadi CEO IHC. Dalam tindakan untuk mendapatkan baki harga jual sebanyak SGD8,727,767.63 ini tambah ganti rugi dan pampasan (*'ta'widh'*), plaintif memohon untuk penghakiman ringkas di bawah A 81 k 1 Kaedah-Kaedah Mahkamah 2012. Defendan menentang permohonan tersebut dengan menyatakan surat ikatan opsyen jual adalah terbatal/tidak boleh dikuatkuasa semasa tempoh jual kerana, antara lain, polisi awam tidak akan membenarkannya untuk melanggar Kod Singapura.

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Diputuskan, membenarkan permohonan:

- (1) Undang-undang Singapura tidak mempunyai kesan ke atas surat ikatan opsyen jual dan notis opsyen jual yang dikawal oleh undang-undang Malaysia berikutan klausa 14 surat ikatan opsyen jual tersebut. Di bawah undang-undang Malaysia, tidak terdapat apa-apa untuk mencadangkan surat ikatan opsyen jual adalah tak sah. Surat ikatan kekal sah, dan kontrak yang mengikat. Notis opsyen jual juga adalah sah kerana ianya dikeluarkan dalam masa tempoh jual. Defendan oleh itu adalah terikat dengan terma-terma surat ikatan opsyen jual dan secara kontrak bertanggungjawab untuk mematuhi notis opsyen jual tersebut (lihat perenggan 27–28 & 31).
- (2) Semenjak 31 Januari 2016, apabila defendan meletakkan jawatan sebagai CEO Kumpulan IHC, dan meskipun notis tuntutan yang dikeluarkan oleh peguam plaintif bertarikh 12 Februari 2016, defendan gagal membayar baki harga jual sejumlah SGD8,727,767.63 yang masih belum dibayar. Tidak terdapat tarikh akhir kepada tempoh selesai opsyen jual tersebut di bawah surat ikatan opsyen jual. Sebaliknya, pihak-pihak telah secara nyata bersetuju bahawa jika defendan gagal untuk membayar harga jual pada tarikh kena dibayar untuk bayaran tersebut, dia mesti membayar kepada plaintif ganti rugi melalui pampasan (*'ta'widh'*) atas jumlah yang belum dibayar (lihat perenggan 29–30).]

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A Cases referred to

National Company For Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300;
[1984] 2 CLJ 220, FC (refd)

Perbadanan Nasional Berhad v Arif bin Awang [2011] MLJU 125; [2011] 1
LNS 237, HC (refd)

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*Sime Bank Bhd (formerly known as United Malayan Banking Corp Bhd) v Kuala
Lumpur City Securities Sdn Bhd* [2001] 5 MLJ 670

Woolley Development Sdn Bhd v Mikien Sdn Bhd [2008] 1 MLJ 585, CA (refd)

C Legislation referred to

Rules of Court 2012 O 14, O 14 r 2, O 81, O 81 r 1

KK Chan (PH Lim with him) (Shook Lin & Bok) for the plaintiff.

*Richard Lee (Mega Mohamad with him) (Jeff Leong, Poon & Wong) for the
defendant.*

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Azizah Nawawi J:

APPLICATION**E**

[1] Enclosure (11) is the plaintiff's application under O 81 r 1 of the Rules of Court 2012 ('the ROC 2012') seeking summary judgment to be entered against the defendant. The prayers which the plaintiff is seeking are as follows:

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(a) an order for specific performance of the put option against the defendant as per the minutes of judgment in Annexure A;

(b) further or in the alternative, damages in addition and in lieu of specific performance in the sum of SGD8,727,767.63 or its equivalent in Malaysian Ringgit to be paid by the defendant to the plaintiff;

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(c) general damages; and

(d) compensation (*ta'widh*).

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[2] Having considered the application, the affidavits and the submission of the parties, this court has allowed the plaintiff's application with costs.

THE SALIENT FACTS**I**

[3] On 17 April 2015, the plaintiff had been issued 26,750,811 new ordinary shares ('option shares') of International Healthway Corp Ltd, Singapore ('IHC').

- [4] On 13 May 2015, the plaintiff and the defendant entered into a call option deed of undertaking ('call option deed') and a put option deed of undertaking ('put option deed') respectively under the Syariah principle of '*wad'*' (promise). **A**
- [5] Pursuant to the call option deed, the plaintiff granted the defendant the call option to require the plaintiff to sell to the defendant the whole or part of the option shares ('call option') at the call price of SGD0.30 for every option share and the call option was only exercisable from the period of 17 April–24 September 2015 ('call period'). **B**
- [6] Pursuant to the put option deed, the defendant granted the plaintiff the put option to require the defendant to purchase from the plaintiff the whole or part of the option shares ('put option') at the call price of SGD0.33 for every option share. **C**
- [7] The salient terms of the put option deed are as follows: **D**
- (a) the put option was exercisable from 25 September–16 October 2015 ('put period') — see cl 2.2; **E**
 - (b) the put option shall be exercised by the plaintiff by serving the defendant a notice in writing of the plaintiff's intention to sell the option shares in the form specified in Schedule 2 — see cl 2.3;
 - (c) both the plaintiff and the defendant agree and undertake to complete the sale and purchase of the option shares — see cl 3.1; **F**
 - (d) in the event that either party defaults in the performance of its obligations and covenants of the put option deed, the other party is entitled to the remedy of specific performance against the defaulting party, and that an alternative remedy of monetary compensation shall not be regarded as compensation or sufficient compensation for any party's default in the performance of the terms and conditions of the deed — see cl 11.1; **G**
 - (e) in the event of any breach, the defaulting party shall indemnify the other party fully against and in respect of all costs, expenses, losses or damages incurred or suffered as a consequence of such breach — see cl 11.2(a); and **H**
 - (f) the put option deed shall be governed by, and construed in accordance with the laws of Malaysia and parties irrevocably submit to the exclusive jurisdiction of the courts in Malaysia — see cl 14. **I**

- A** [8] On 19 June 2015, IHC announced a proposed acquisition of Healthway Medical Corp Ltd ('HMC') by way of a scheme of arrangement ('proposed merger').
- B** [9] On 23 September 2015, the defendant wrote to the plaintiff to inform, inter alia, the following:
- (a) that as he (the defendant) was the Chief Executive Officer of IHC, he is then regarded as a person having confidential and price-sensitive information;
 - C** (b) that therefore he was unable to exercise the call option during the call period on the ground that he was restricted from doing so as a result of restrictions arising from the proposed merger; and
 - D** (c) that he (the defendant) sought an extension of three months of the put period.
- [10] In response to the defendant's letter, the plaintiff relied that it was unable to accede to the defendant's request in its letter dated 2 October 2015.
- E** [11] On 8 October 2015, the plaintiff issued a put option notice dated 8 October 2015 ('put notice') to the defendant to purchase the whole of the option shares for the sum of SGD8,827,767.63 ('put price'). The put notice was issued within the put period.
- F** [12] On 15 October 2015, the defendant's solicitor, Messrs Pinnacle Law LLC, wrote to the plaintiff requesting the plaintiff to withdraw the put notice issued by the plaintiff to the defendant. The basis of the request is:
- G** (a) that there had been delays in obtaining the approval and confirmation from the Securities Industry Council, Singapore ('SIC') of the proposed merger; and
 - (b) that the defendant was restricted by the Singapore Code on Take-Overs and Mergers ('Singapore Code') from dealing with the securities of IHC
 - H** pending approval from SIC.
- [13] In response, the plaintiff's solicitors replied on 5 November 2015 that the put option deed is governed by the laws of Malaysia, that the same is valid and binding on both parties, that the put notice was validly issued and that the defendant has breached the put option deed by refusing to honour the put notice.
- I**

[14] On 22 December 2015, the defendant paid SGD100,000 towards the put option on an ex gratia basis, which was received by the plaintiff on 8 January 2016.

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[15] On 7 January 2016, IHC announced that the defendant had retired and had ceased to be the Chief Executive Officer of IHC effective from 7 January 2016.

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[16] On 12 February 2016, the plaintiff issued a letter to the defendant demanding the outstanding payment of the put price of SGD8,727,767.63:

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Option shares	26,750,811 shares
Put price per share	SGD \$0.33
Put price	SGD \$8,827,767.63
Less – ex gratia payment	SGD \$100,000
Outstanding put price	SGD \$8,727,767.63

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[17] When the defendant failed to respond to the plaintiff's letter, the plaintiff initiates the present action against the defendant.

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THE FINDINGS OF THE COURT

[18] The plaintiff's application is premised on O 81 of the ROC 2012, which is an application for summary judgment in respect of the plaintiff's claim for specific performance against the defendant.

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[19] In an application under O 81 of the ROC 2012, the principles governing summary judgment under O 14 of the ROC 2012 are applicable. In *Woolley Development Sdn Bhd v Mikien Sdn Bhd* [2008] 1 MLJ 585, the Court of Appeal held that:

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[45] This application was made under O 81 of the RHC. Order 81 r 3 of the RHC states that:

Unless on the hearing of an application under rule 1 either the court dismisses the application or the defendant satisfies the court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the court may give judgment for the plaintiff in the action.

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[46] The plaintiff in a summary judgment application first needs to establish and prima facie case that 'he is entitled to judgment'. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 302 per Seah FJ). 'Ought' in O 81 r 3, is an expression of a strong probability. In other words, the issue in dispute must be critically investigated as genuine. This is what a defendant needs to prove to be entitled to a trial of that disputed issue.

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- A** [20] In an application for summary judgment, this court is guided by the principles laid down in *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 2 CLJ 220, where it was stated by the Federal Court as follows:
- B** ... We think it appropriate to remind ourselves once again that in every application under O 14, the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14, the preliminary requirements:
- C** (i) the statement of claim must have been served on the defendant;
(ii) the defendant must have entered an appearance;
(iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.
- D** ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against him ...
- E** [21] In the present case, the plaintiff had satisfied the preliminary requirements as laid down in the *Kayu Raya's* case that is:
- F** (a) the statement of claim have been served on been served on the defendant;
(b) the defendant has entered appearance; and
(c) the affidavit in support is in compliance with O 14 r 2 of the ROC 2012.
- G** Therefore, the burden is then shifted to the defendant to satisfy the court why judgment should not be entered against them.
- [22] The defendant raised the issue of the validity of the put option notice in the following manner:
- H** (a) that as a result of the proposed merger between IHC and HMCL, the defendant was regarded as a person who has confidential price-sensitive information, and therefore he cannot deal in the securities of IHC until the termination of the merger discussions. Thus, the put option deed was rendered incapable of performance during the put period from
- I** 25 September–16 October 2015; and
(b) that the put option deed is voidable and/or unenforceable for being in contravention of the public policy of Malaysia as the performance and/or operation of the put option deed would have resulted in breach

of the Singapore Code on Take-Overs and Mergers ('Singapore Code') and the public policy of Malaysia would not countenance such a breach. A

[23] It is not in dispute that the plaintiff has exercised the put option during the put period. It is also not in dispute that during the put period when the plaintiff exercised the put option, there were discussion on the proposed merger between IHC and HMCL. The defendant during this relevant period was the Group CEO of IHC and is therefore restricted from dealing with the securities of IHC under r 11 the Singapore Code. B

[24] The defendant has relied on the legal opinion of Aqbal Singh s/o Kuldip Singh, a practicing member of the Singapore Bar who gave legal opinion on the application of the laws of Singapore as to 'whether Mr Fan Kow Hin was restricted under Singapore law and/or regulations and/or the codes from purchasing the securities of IHC pursuant to a Put Option dated 8.10.2015 (Put Option Notice) issued by the Bank Muamalat Malaysia Berhad'. C D

[25] In his affidavit affirmed on 21 July 2016, Mr Aqbal Singh gave his professional opinion on the position of the Singapore laws, which, inter alia, are as follows: E

(a) in para 37:

It is my professional opinion that Mr. Fan was under a legal impediment imposed by the laws on insider trading in the Securities and Futures Act ('SFA') and rules in the Singapore Code on Take-overs and Mergers (the 'Code') that prevented him from purchasing the shares in IHC pursuant to the Put Option Notice throughout (inter alia) the Put Period. F

(b) in para 52:

Mr Fan was therefore prevented by rule 11.1 of the Code from purchasing securities from IHC from September 2015 until the effective date of his resignation as Group CEO of IHC on 31 January 2016, when he would have ceased to be in a position to receive confidential price-sensitive information relating to the proposed merger. G

(c) in para 53:

He was therefore prohibited by the Code from complying with the Put Option Notice, which was issued on or around 8 October 2015. H

(d) in para 54:

Further, given the period in which the restriction in rule 11.1 was operative (from September 2015 to 31 January 2016), Mr Fan could not have complied with the Put Option Notice had it been issued at any time during the Put Period from 25 September 2015 to 16 October 2015. I

A (e) in para 55:

Had Mr Fan purchased the securities in IHC pursuant to the Put Option Notice, this would have subjected Mr. Fan to the scrutiny of the SIC and the above penalties.

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[26] The plaintiff did not dispute the above position in respect to the laws of Singapore, as the plaintiff did not file an expert opinion to rebut the same. However, having considered the expert opinion of Mr Aqbal Singh, there is nothing in his affidavit to suggest that the put option notice issued by the plaintiff was invalid, as submitted by learned counsel for the defendant. What is pertinent in the expert opinion is that the defendant was prohibited by the Singapore Code from complying with the put option notice from September 2015 to 31 January 2016, when he resigned from his position as Group CEO of IHC.

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[27] As such, the laws of Singapore have no impact on the put option deed and the put option notice, which are governed by the laws of Malaysia pursuant to cl 14 of the put option deed, which states as follows:

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14. Governing law

This Deed of Undertaking shall be governed by, and construed in accordance with the laws of Malaysia and the parties hereto irrevocably submit to the exclusive jurisdiction of the Courts in Malaysia ...

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[28] Under the laws of Malaysia, there is nothing to suggest that the put option deed is invalid, and I agree with the plaintiff that the said deed remains valid, lawful and binding contract. I am also of the considered opinion that the put option notice is also valid as the same was issued within the put period. In *Sime Bank Bhd (formerly known as United Malayan Banking Corp Bhd) v Kuala Lumpur City Securities Sdn Bhd* [2001] 5 MLJ 670, the court held as follows:

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The put option agreement is a highly formal, properly negotiated and professionally drawn up document by the practitioners of law. It imposes upon the defendant the liability to pay out a very large sum of money should the borrower default on the loan and the plaintiff decides to exercise the option. *The agreement is conclusive of all essential terms embodied within the four corners of the put option agreement read wherever necessary in conjunction with the facility agreement and the charge of securities.* (Emphasis added.)

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[29] The only issue then is on compliance of the defendant with regards to the put option notice. I accepted the legal opinion of Mr Aqbal Singh that the defendant was prohibited by the Singapore Code from complying with the put option notice from September 2015 to 31 January 2016. But since 31 January 2016 and despite the notice of demand issued by the plaintiff's solicitor's dated 12 February 2016, the defendant has failed to pay for the outstanding payment

of the put price of SGD8,727,767.63 for the purchase of the whole of the option shares in accordance with the terms and conditions of the put option deed. In *Perbadanan Nasional Berhad v Arif bin Awang* [2011] MLJU 125; [2011] 1 LNS 237, Justice Nallini Pathmanathan allowed the O 81 application of the plaintiff for specific performance to require the defendant to purchase option shares and further held as follows:

... It cannot be said that simply because:

- (a) *The Defendant failed to comply with the Option notice dated 19 May 2004 that the Put and Call Option has lapsed. In fact, after the exercise of the option, it became incumbent upon the Defendant to purchase the Option shares at the agreed price;*
- (b) *The Call Period may well have lapsed by 7 June 2004, but the option was exercised prior to that date.*
- (c) *The letter of 1 September 2004 does not alter the foregoing facts, namely of the due exercise of the option within the call period or the fact that the Defendant failed to adhere to his obligations ...*
- (d) *None of these matters comprises an issue that needs further ventilation at trial. I therefore cannot conclude that the foregoing raises a triable issue ... (Emphasis added.)*

[30] Added to that, I agree with the plaintiff that there was no deadline as to the completion period of the put option under the put option deed. Instead, it was expressly agreed by the parties that in the event that the defendant fails to pay for the put price on the due date for payment, the defendant shall pay the plaintiff damages by way of compensation '*ta'widh*' on the amount outstanding.

[31] As such, I am of the considered opinion that the defendant is bound by the terms of the put option deed and is therefore under the contractual obligation to comply with the put option notice issued by the plaintiff within the put period.

[32] In the premise, the plaintiff's application for summary judgment is allowed with costs.

Application allowed.

Reported by Ashok Kumar